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No. 800

In the Supreme Court of the United States

OCTOBER TERM, 1958

ADOLPH C. BURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a–15a) is reported at 262 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1959 (Pet. 15a). A petition for rehearing was denied on February 26, 1959. The petition for a writ of certiorari was filed on March 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether, where a timely complaint was filed to toll the running of the statute of limitations, prosecu-

tion on an indictment thereafter entered was barred because the clerk of the district court placed the complaint in the wrong file and did not transfer it to the proper file until, after the conclusion of the trial, the point was first raised by petitioner.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

SEC. 3748. PERIODS OF LIMITATION.

(a) *Criminal Prosecutions.*—No person shall be prosecuted, tried or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

* * * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

* * * * * * *

* * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

* * * * * *

STATEMENT

On December 18, 1953, petitioner and one Cooper were indicted in the United States District Court for the Eastern District of Missouri, Eastern Division, for having wilfully attempted to defeat and evade a large part of the taxes of Andy Burger Motors, Inc., for the fiscal years ended June 30, 1947, and June 30, 1948, by filing and causing to be filed false and fraudulent tax returns, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of corporate net income and tax liability reported on the returns, as compared with the true amounts, were alleged to be as follows (R. 1–2):

Fiscal year ending	Net income		Tax liability	
	Reported	Corrected	Reported	Corrected
June 30, 1947	$472,672.20	$614,744.57	$170,615.46	$233,602.94
June 30, 1948	312,636.82	351,607.19	118,334.38	133,143.07

After a jury trial petitioner was found guilty on both counts (R. 215). On April 18, 1958, the trial judge imposed concurrent four-year prison sentences on each count (R. 210). The judgment was unanim-

mously affirmed by the court of appeals (Pet. 1a-15a).

Prior to trial, the indictment was dismissed as to the defendant Cooper (R. 12, 97), who had already served a prison sentence for perjury arising out of his denials to Treasury agents in 1952 that he or Andy Burger Motors, Inc. had ever received money from automobile purchasers in excess of the invoice price (R. 97; *Cooper* v. *United States*, 233 F.2d 821 (C.A. 8th), certiorari denied, 352 U.S. 837). A similar indictment involving another Burger agency was dismissed as to the witness Crocker (R. 139), who had also served a prison term after pleading guilty to perjury charges (R. 134, 137).

The evidence to support the verdict may be summarized as follows:

Petitioner and his wife owned all of the outstanding stock of Andy Burger Motors, Inc. (hereinafter referred to as the corporation) (R. 14, 15, 103). Petitioner was president and Cooper was vice-president and the active manager (R. 14, 15, 102, 159). Two lesser Burger auto agencies were operated as part of the corporation and one of them, Community Motors, was managed by Crocker (R. 14, 134, 157). Petitioner closely supervised the management activities of Cooper and Crocker (R. 103, 171).

The books of the corporation, which were in agreement with the tax returns, included in income only the invoice price of new and used cars sold, and it followed that income had been understated on the returns to the extent of any income received in addition to the invoice price (R. 174). Most of the used

cars obtained by the corporation as trade-ins on new cars were sold to dealers (R. 81, 136). All of these dealers testified that they paid Cooper or Crocker cash over and above the invoice price for virtually all of the used cars. This practice was followed at all three Burger agencies (R. 114, 118, 119, 127, 131). On a few of the new cars, where a trade-in of a used car was not involved, the purchaser also paid cash in addition to the invoice price (R. 82, 141). Seven individuals testified with respect to such payments, including one purchaser who stated that petitioner himself had told him that in order to get two cars he would have to pay Cooper $700 in addition to the invoice price, which the purchaser did (R. 24, 26, 113, 121–126, 132). Another purchaser testified that he had first consulted petitioner, who had advised him that any deal he and Cooper could agree upon was all right with petitioner, and that he had paid Cooper $1,700 in currency over the invoice price (R. 121). The other five new car purchasers had dealt exclusively with Cooper (R. 26, 113, 122–125, 132).

Cooper testified that late in 1945, pursuant to instructions from petitioner, the agency initiated the practice of exacting from purchasers of automobiles, then a scarce commodity, cash payments over and above the invoice price (R. 80–81, 102–103); that the practice continued until late in 1948 or early in 1949, and applied to between 75% and 90% of the used cars and about 10% or 15% of the new cars sold (R. 81–82); that petitioner got 90% of the currency and Cooper, 10%, in accordance with their agreement

(R. 82); that none of the cash went to the bookkeeper or was placed on the books of the company (R. 85–86, 91, 103);[1] and that, pursuant to orders from petitioner, he (Cooper) had kept records of the cash overages (R. 82). Cooper produced his memorandum book records of the many hundreds of transactions in question, explaining that the original of each slip had been torn out and given to petitioner at the time the money was turned over to him, and that the carbon copies remained bound in the memorandum books (R. 82–83, 96, 105, 109, 112).[2] The total unreported cash overages disclosed by Cooper's books were $161,602.69 for the first fiscal year, and $60,651 for the second fiscal year (R. 147). Cooper further stated that while he was serving the prison term on his conviction for perjury (*supra*), he was receiving his base salary of $550 a month; that when he was released petitioner raised it to $1,000 a month; and that he continued to work for petitioner until about three weeks before the trial (R. 79–80).

Crocker testified that he had been manager of Community Motors; that between early 1946 and early 1948, pursuant to instructions from petitioner, he had followed the practice of exacting cash premium payments in addition to the invoice price of cars (R. 134–136); that he had received cash overages on about 75% of the used cars (R. 136); that he had had sev-

[1] The bookkeepers verified the fact that they had never been given any of the under-the-table money, and that it did not appear on the books (R. 16–19).

[2] Two witnesses saw Cooper make such entries (R. 115, 118).

eral conversations with petitioner to the effect that the Government could prove nothing on them (R. 136); that none of the cash overages had gone to the bookkeepers (R. 142); and that Crocker had given petitioner 90% of the overages and retained 10% for himself, pursuant to their agreement (R. 137, 140–141). Crocker testified further that he had entered a plea of guilty to a perjury charge, having previously given false testimony before the Treasury agents by denying the receipt of the cash overages; that while he was serving his prison sentence he was receiving his base salary of $550 a month; and that when he was released petitioner raised it to $1,000 a month (R. 134–135, 137).

Petitioner, testifying in his own defense, denied that he had ever asked or received cash in excess of the invoice prices, and stated that Cooper and Crocker had been instructed to charge the "Ford suggested delivery price" (R. 160, 162, 169, 171). Petitioner admitted that the cash overages were not reported as income on the corporation's returns or on his individual tax returns, and claimed the reason was that he had not received the money (R. 162, 171). Petitioner insisted that he had never heard about any such payments until 1949 (R. 162), and that it was not until after Cooper was convicted of perjury and Crocker pled guilty to perjury that he came to believe that they had actually accepted such payments (R. 170).

ARGUMENT

1. Petitioner's principal argument (Pet. 7–9, 14–21), that the evidence was insufficient to support the

verdict, is plainly without merit. There was direct testimony by the purchasers of automobiles that they had made the over-invoice payments to Cooper and Crocker, the active managers of the corporation's sales agencies; and testimony by Cooper and Crocker that they had paid 90% of the overages to petitioner, who controlled the corporation (*supra*, pp. 5–7). The cash overages collected by Cooper alone during the two prosecution years exceeded $222,000, none of which was recorded on the corporate books or reported as income on the corporation tax returns or petitioner's individual tax returns (*supra*, pp. 6, 7). Against this overwhelming proof the jury found petitioner's denials of receiving the money (*e.g.*, R. 171) incredible, and returned a verdict of guilty. Petitioner's attack in this Court on the sufficiency of the evidence is dual: (a) that the funds in question were not shown to be income to the corporation in the absence of proof that petitioner's wife, who owned almost half the stock, "consent[ed] to the taking" (Pet. 7); and (b) that the conviction rests upon the uncorroborated testimony of two perjurers, Cooper and Crocker (Pet. 14–21).

a. Petitioner was the principal officer and controlling stockholder of the corporation (owning slightly more than 50% of the outstanding shares) and personally supervised its operations (R. 14, 15, 103, 110–111, 171). In these circumstances the courts have uniformly held that diverted profits like those involved in the instant case are taxable as income to the corporation and are taxable as dividends, to the extent of earnings and profits, to the officer-stock-

holders receiving them. *Currier* v. *United States*, 166 F. 2d 346, 348 (C.A. 1); *Drybrough* v. *Commissioner*, 238 F. 2d 735, 738 (C.A. 6); *Simon* v. *Commissioner*, 248 F. 2d 869 (C.A. 8th); *Kann* v. *Commissioner*, 210 F. 2d 247, 251 (C.A. 3), certiorari denied, 347 U.S. 967; *United Mercantile Agencies, Inc.* v. *Commissioner*, 23 T.C. 1105, 1112, and cases cited. Whether petitioner's wife, the minority stockholder, acquiesced in the receipt of the over-invoice payments is of no consequence. *Union Stock Farms* v. *Commissioner* (C.A. 9), decided March 9, 1959 (59-1 U.S.T.C., par. 9317); *Drybrough* v. *Commissioner*, *supra*, p. 738; *Currier* v. *United States*, *supra*, p. 348.[4] *Sherin* v. *Commissioner*, 13 T.C. 221, the case relied upon by petitioner (Pet. 8-9), is easily distinguishable on its facts. In that case the corporate officer responsible for over-ceiling charges was not a controlling stockholder, and the overcharges were not levied on the regular customers of the corporation, but only upon seven new customers who received special services. The court found as a fact that it could not be said that Sherin had "intended to act for the corporation" (p. 229).

[4] Petitioner's attempted reliance on the *Currier* case (Pet. 7) is misplaced. He claims that in that case the appellate court "found it necessary to conclude that the shareholder in question [who owned only 75% of the stock] was in effect the owner of all the corporate stock." (Pet. 7). On the contrary, the court stated that the trial court had so found, but held that "even if this finding be disregarded, we think it clear that he was acting for and not against the interests of the corporation. Here an essentially individual ownership business is being run in a corporate form. The owner can hardly be considered to be acting against his own interests." 166 F. 2d at 348.

The argument now advanced by petitioner is an afterthought on appeal, no suggestion having been made in the district court that the evidence was inadequate in this respect. Moreover, there was evidence from which the jury could have concluded that petitioner would not be syphoning off hundreds of thousands of dollars from the corporation without his wife's knowledge.[4]

b. Cooper and Crocker were convicted of perjury for doing just what petitioner did in the instant case, *i.e.*, denying the receipt of cash over-invoice payments from the corporation's customers. They later changed their position, decided to tell the truth, and testified as witnesses for the Government. The defense, naturally enough, took full advantage of the situation and emphasized in the opening statement (R. 234) and throughout the trial that Cooper and Crocker were convicted perjurers whose testimony was not to be trusted. But, unlike the situation in the cases relied upon by petitioner (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh* v. *United States*, 352 U.S. 1), the Government and the jury were well aware of the earlier transgressions of these two witnesses, and evaluated their credibility accordingly. In the *Communist Party* and *Mesarosh* cases, moreover, the testimony of the challenged witnesses was of the *same* tenor as the allegedly perjurious testimony given by them in other proceedings.

[4] Petitioner testified that he consulted closely with his wife about business matters and that as soon as he learned about the over-invoice payments he discussed them with her. (R. 162, 168–169).

A showing of perjury in the other proceedings, therefore, would have tended directly to discredit their testimony in the proceedings being reviewed. Here, on the other hand, the testimony of Cooper and Crocker was directly contrary to the testimony for which they had been convicted of perjury and their perjury convictions thus tended, if anything, to corroborate their testimony in this case.

Of course, in circumstances such as these the testimony of a witness must be subjected to special scrutiny by the jury, and they were so instructed. (R. 185–186, 187–188.) But there is no legal impediment to their testifying, or any requirement that their testimony be corroborated. *United States* v. *Reina*, 242 F. 2d 302, 307 (C.A. 2d); *Haakinson* v. *United States*, 238 F. 2d 775, 779 (C.A. 8th). Moreover, the record shows that there was ample corroboration. Many purchasers of cars testified to the practice of Cooper and Crocker of collecting cash overages, at all three sales locations (*supra*, pp. 4–5) and one purchaser verified the fact that petitioner was aware of the practice (R. 24). Cooper's testimony was corroborated by his detailed records of the hundreds of sales involved (*supra*, p. 6). Petitioner admitted that despite the fact that he "had concluded that Mr. Cooper and Mr. Crocker had taken money from me after that perjury conviction and trial, I went ahead and paid them some salary and money while they were in prison for services rendered" (R. 170) and that he had made no attempt to collect on their $25,000 fidelity bonds (R. 171). Finally, the jury could use its common sense in concluding that petitioner, who

admittedly kept a close watch on all his enterprises (R. 171), would not have permitted Cooper and Crocker, mere employees, to keep, in addition to their salaries, hundreds of thousands of dollars realized from the sale of the corporation's automobiles.

2. Equally without merit is the argument (Pet. 9–13) that the first count of the indictment was barred by the statute of limitations. No such point was raised at the trial, and if it had been the Government would have introduced evidence to show that a complaint was properly instituted before a Commissioner of the United States within the six-year period of limitations (R. 217–218). Sec. 3748, Internal Revenue Code of 1939, *supra*, p. 2–3. Having failed to raise the issue at the proper time, petitioner cannot complain now. There is no conflict between the decision here and the cases relied upon by petitioner, *White* v. *United States*, 216 F. 2d 1 (C.A. 5), and *Flemister* v. *United States*, 260 F. 2d 513 (C.A. 5), for in those cases the issue was raised before or during the trial. In the recent case of *United States* v. *Keenan* (C.A. 7), decided March 26, 1959 (1959 A.F.T.R., ¶ 59–527), the Seventh Circuit, confronted with almost the identical contention made here, stated:

> The holding of these two cases [*White* and *Flemister*] adequately supports the proposition that a trial judge errs in overruling a motion to dismiss when he relies, through judicial notice, on something that does not exist in the record.
>
> We do not think that either case is applicable to the situation before us. The trial

> judge below was never given an opportunity to rule on the point. * * *
>
> We hold that as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations. We hold further that the defendant is in no position to raise the point for the first time on this appeal. Had this point been timely raised below, there would have been ample opportunity for the Commissioner to file the records with the District Court.

The complaint filed in this case was timely and was perfected by the issuance and service of a warrant of arrest (R. 217–221). When the complaint was transmitted to the district court, however, it was inadvertently filed in the jacket of a related case (involving petitioner and Crocker) (R. 221). It is clear, as the court below held (Pet. 9a), that petitioner could not have been prejudiced by this misfiling, and that the matter could have been straightened out at the trial if the issue had been raised.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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